

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of	)	Case No.: <b>10-O-06599-PEM</b>
	)	
<b>JOHN CHAUNCEY HAYES,</b>	)	<b>DECISION AND ORDER OF</b>
	)	<b>INVOLUNTARY INACTIVE</b>
<b>Member No. 88708,</b>	)	<b>ENROLLMENT</b>
	)	
<u>A Member of the State Bar.</u>	)	

**Introduction**<sup>1</sup>

In this disciplinary proceeding, respondent John Chauncey Hayes is charged with multiple acts of misconduct in one client matter. The charged misconduct includes (1) failing to maintain client funds in a trust account; (2) failing to render accounts of client funds; (3) misrepresenting to a client; (4) misappropriating client's child support payments (\$122,411.37); (5) failing to release client file; (6) failing to respond to client inquiries; and (7) failing to timely update his membership address.

This court finds, by clear and convincing evidence, that respondent is culpable of seven of the ten charged counts. Based upon the serious nature and extent of culpability, as well as the applicable mitigating and aggravating circumstances, the court recommends that respondent be disbarred from the practice of law and ordered to make restitution.

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<sup>1</sup> Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

### **Significant Procedural History**

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on September 21, 2011. On November 2, 2011, respondent filed a response to the NDC. On January 10, 2012, the parties filed a stipulation as to undisputed facts.

A three-day trial was held on January 10, 11, and 12, 2012. The State Bar was represented by Deputy Trial Counsels Sherrie B. McLetchie and respondent represented himself. On January 12, 2012, following closing arguments, the court took this matter under submission.

### **Findings of Fact and Conclusions of Law**

Respondent was admitted to the practice of law in California on November 29, 1979, and has been a member of the State Bar of California at all times since that date.

#### **Case No. 10-O-06599 – Contreras**

##### **Facts**

On April 7, 2005, Gloria Contreras (Contreras) requested the assistance of the California Department of Child Support Services (DCSS) in collecting child support arrears from her ex-husband. On May 16, 2005, DCSS initiated an action in Sacramento County Superior Court to recover child support arrears on behalf of Contreras. On September 12, 2005, a default judgment in the amount of \$132,443.43 was entered against Contreras's ex-husband and the court ordered collection of the arrears by wage assignment payable to DCSS.

Sometime before March 2006, Contreras sold a piece of property in Menlo Park, whose proceeds were the subject of a dispute between Contreras and her ex-husband. On February 28, 2005, Old Republic Title Company issued a check to Contreras and her ex-husband for \$139,846.55, but held the check in escrow until various lis pendens could be resolved.

On March 15, 2006, Contreras hired respondent for legal representation in the continuing child support matter; an unlawful detainer action against her ex-husband; and a claim of ownership by her ex-husband to the property which was the subject of the unlawful detainer and related cross-actions.

Contreras signed an Attorney-Client Fee Contract (Litigation)<sup>2</sup> drafted by respondent which, among other things, provided the following:

- Respondent's hourly fee for all the matters would be \$200;
- Respondent would not change the rate without first providing Contreras at least 60 days written notice of the proposed changes and if such notice was given, respondent and Contreras agreed to negotiate in good faith with respect to such proposed changes and execute a written amendment to this Agreement reflecting the agreed-on rate changes;
- Respondent would give Contreras monthly statements unless no fees or cost or only nominal fees were incurred in any given month; and
- Contreras agreed to grant respondent a lien for all unpaid attorney fees and costs and acknowledged that this lien may significantly impair her interest because respondent may be able to delay payment of any recovery of funds to her until any disputes with respondent about unpaid attorney fees and costs advanced had been resolved.

Shortly after May 28, 2006, Contreras received the first monthly statement from respondent which showed a total balance due of \$4,900. On September 3, 2006, Contreras paid respondent \$5,000.

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<sup>2</sup> Neither respondent nor Contreras could produce a copy of this fee agreement with Contreras' signature. However, Contreras testified that she did sign a fee agreement whereby she agreed to pay respondent \$200 an hour.

In early November 2007, respondent received three DCSS checks totaling \$142,416.17 made payable to respondent and Contreras, which represented Contreras's child support arrears:

<i>Check No.</i>	<i>Amount</i>
8885	\$41,243.55
8886	\$99,999.99
1559	<u>\$ 1,172.63</u>

***DCSS Checks     \$142,416.17***

In early November 2007 respondent deposited the DCSS checks into his client trust account number 16640-60398 at The Merchants National Bank (CTA). Thereafter, respondent told Contreras that he could not release the funds until her ex-husband and his counsel signed some form of release.

On December 13, 2007, respondent issued a CTA check for \$6,000 to Contreras, which represented three months' rent received from Contreras's ex-husband and therefore, was totally unrelated to the amount respondent owed her on the money he had received from DCSS.

Soon after he had deposited the DCSS checks in his CTA, the balance dipped below the amount. On January 30, 2008, the CTA balance was \$142,269.82 and remained less than \$142,416.17 until respondent deposited \$300,000 made jointly payable to respondent and another person on February 6, 2008.

However, beginning March 2008, the CTA balance continued to fall below \$142,416.17, the back child support which respondent was entrusted to hold. On May 9, 2008, respondent issued a CTA check for \$20,000 to Contreras. Respondent told her that it represented ten months' rent (\$2,000 x 10 months) that Contreras' ex-husband did not pay. Respondent further represented to Contreras that "the court" had approved his withdrawal from the child support

arrears to pay her the unpaid rent. Other than the \$20,000, respondent did not pay Contreras any other additional funds. Thus, respondent should have been holding \$122,416.17 (\$142,416.17 - \$20,000) for Contreras for past due child support payments. Yet, within two years, by February 2010, the CTA balance dipped to \$4.80.

Briefly, the CTA balances were as follows:

<i>Date</i>	<i>CTA Balance</i>
March 17, 2008	\$97,752.62
May 12, 2008	\$38,247.62
June 30, 2008	\$75,994.70
March 20, 2009	\$ 251.17
June 11, 2009	\$ 212.87
July 10, 2009	\$ 164.87
February 16, 2010	\$ 4.80

In late 2008, after all the lis pendens were expunged, through court action undertaken by respondent, Old Republic Title Company released the February 2005 check of \$139,846.55 directly to Contreras because her ex-husband and his attorney were unwilling to have the check sent to respondent.<sup>3</sup> At the time, respondent admitted that he never sent Contreras an invoice for his legal services, even though their fee agreement required him to send her monthly statements.

In June 2009, respondent told Contreras that he could not release to her the remainder of the DCSS funds without a court order. In fact, respondent did not tell her the truth because throughout June 2009 respondent never had more than \$3,000 in the CTA. Respondent admitted that he did not make a demand upon Contreras for attorney fees.

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<sup>3</sup>In 2007, respondent expected the Old Republic Title Company check to be released to his CTA.

After June 8, 2009, Contreras continued to telephone respondent and leave messages requesting that respondent release the balance of the child support arrears (\$122,416.17) which respondent was supposed to be holding on her behalf.

On July 9, 2009, respondent filed a Notice of Motion and Motion for Award of Attorney's Fees; Memorandum of Points and Authorities; Declaration of J. Chauncey Hayes in Support Thereof in *Contreras v. Guinea*, Sacramento County Superior Court, case number 05UD 02512, the unlawful detainer action in which respondent was representing Contreras against her ex-husband. In support of the motion, in a declaration under penalty of perjury dated July 3, 2009, respondent declared that he had "kept contemporaneous daily records" of the time spent and the nature of the work he performed, and he was claiming 97.85 hours for work spent on the case "at a rate of \$350 per hour . . . as agreed to by Ms. Contreras in this matter, and for which she is now obligated." Respondent did not provide a copy of his motion for award of attorney's fees to Contreras. Ultimately, the superior court granted respondent's motion for an award of attorney's fees to Contreras.

On December 23, 2009, respondent sent Contreras a letter regarding the status of the total judgment in the unlawful detainer action, which included the award of attorney fees. In that letter, there was no mention of the attorney fees that Contreras owed him. By then, the CTA balance was \$1,944.80.

On February 16, 2010, the CTA balance fell to a low of \$4.80. After repeated, unsuccessful telephone calls to respondent, Contreras went to respondent's office in Fair Oaks in May 2010. She discovered that his office was vacant and that it was for lease. Respondent had vacated that office location without giving her any notice.

In May 2010, Contreras submitted a complaint against respondent to the State Bar. Not until June 26, 2010, did respondent notify Contreras that he had moved his office to Carmichael.

By letter dated August 3, 2010, addressed to 4092 Bridge Street, Fair Oaks, California 95628 (respondent's then State Bar membership records address), State Bar Investigator Syed Majid (Majid) attempted to notify respondent of Contreras's complaint. The August 3, 2010 letter was returned to the State Bar as undeliverable.

State Bar Investigator Crystal Velazco (Velazco) left a voice-mail message for respondent, advising him that the investigation was now assigned to her, that the August 3, 2010 letter had been returned to the State Bar, and requesting his current address.

On August 17, 2010, Contreras and respondent met in person. Respondent gave Contreras the second statement she had ever received from him which was dated August 17, 2010. It detailed the legal services that respondent rendered from June 5, 2006 through December 23, 2009, and included the previous balance of the first statement in May 2006 (\$4,900). The statement claimed \$116,550 in earned fees at an hourly rate of \$250 and \$2,628.93 in costs, for a total balance due of \$119,178.93.

Respondent told Contreras that he had applied the DCSS funds toward his attorney fees. At the meeting, Contreras verbally terminated respondent as her attorney and requested her files.

On August 18, 2010, respondent telephoned the State Bar and requested that Velazco send him the State Bar's August 3, 2010 letter specifically by fax and by mail to 7737 Fair Oaks Blvd., #447, Carmichael, California 95608.

On August 18, 2010, Velazco sent respondent a letter, including a copy of the August 3, 2010 letter, to 7737 Fair Oaks Blvd., #447, Carmichael, California 95608, as well as to 4092 Bridge Street, Fair Oaks, California 95628, which remained respondent's membership records address. Velazco also faxed the letters to the fax number provided by respondent.

Velazco's August 18, 2010 letter specifically informed respondent of his duty to keep the State Bar advised of his current address, enclosed a State Bar address change form, and

requested a written response and certain documents no later than September 1, 2010.

Respondent received the August 3 and 18, 2010 letters, by fax, on August 18, 2010, and the mailed copies shortly thereafter.

On August 24, 2010, Contreras wrote respondent and generally disputed respondent's August 17, 2010 statement, noting that this was the second statement from him since May 28, 2006; that he had charged her at an hourly rate of \$250, rather than the agreed-upon \$200 hourly fee; that he had not credited her for the September 2006 payment (\$5,000); and that he had charged a 25-hour telephone call which had not occurred. Contreras requested that her files be returned to her by August 31, 2010.

In a response letter to Contreras, respondent acknowledged that the charge of a 25-hour telephone call should have been a .25 hour telephone conversation (\$62.50 and not \$6,250). Respondent stated that he would "have a revised bill, along with any refund ready shortly." Further, respondent stated that he had begun copying Contreras's files and would have them ready for delivery to Contreras the following week.

Respondent did not respond to Velazco's August 18, 2010 letter by September 1, 2010, as requested. By letter dated September 2, 2010, Velazco notified respondent that she had not received a response from him and gave him until September 17, 2010, to respond. She also noted that he had yet changed his membership records address. In response, respondent changed his State Bar address on September 15, 2010, and wrote a seven-page reply letter to Velazco, responding to Contreras's complaint, on September 16, 2010.

On September 7, 2010, not having received a revised bill, any refund or her files, Contreras again wrote to respondent, pointing out that he had miscalculated his fees at \$250 per hour, rather than the agreed upon \$200 hourly fee, and providing him with a copy of the pertinent page of the fee agreement and a copy of Contreras's \$5,000 cancelled check. When



Contreras visited 7737 Fair Oaks Boulevard, Carmichael, California 95608, which respondent had described to her as his new office location, she discovered that the address was a private postal box location.

On January 26, 2011, Contreras again requested her files. Contreras also implicitly acknowledged that respondent did a lot of legal work for her for which she had not paid him. By her calculation, respondent owed her \$33,650. She demanded the funds and her files be returned to her.

On February 9, 2011, respondent wrote Contreras that he would resume copying her files, make arrangements for delivery, and provide an updated accounting. He also disputed her accounting that he owed her \$33,650 and invited her to visit his office to resolve the matter.

On August 4, 2011, respondent, through his counsel, was notified that the State Bar alleged that respondent's September 16, 2010 letter had not fully responded to the investigators' letters of August 3 and August 18, 2010, nor provided all the documents and explanation requested by the letters regarding Contreras's complaint. The State Bar asked that respondent provide the requested documents and written explanation no later than August 17, 2011.

On September 7, 2011, respondent, through his counsel, delivered to Contreras three boxes of documents described as her entire, complete, original client file. After the filing of the NDC on September 21, 2011, respondent was no longer represented by counsel and represented himself to date.

In recalculating respondent's August 2010 statement, at \$200 per hour, with credit given for the \$5,000 paid by Contreras and the adjusted number of hours for the telephone conversation from 25 hours to .25 hour, the outstanding billing statement should have been \$87,438.93.<sup>4</sup>

Therefore, based on the revised August statement of outstanding fees and costs in the amount of \$87,438.93 and the child support arrears of \$122,416.17, respondent still owes Contreras in the amount of **\$34,977.24** (\$122,416.17 - \$87,438.93).

### **Conclusions**

#### ***Count 1 - (Rule 4-100(A) [Failure to Maintain Client Funds in Trust Account])***

Rule 4-100(A) provides that all funds received or held for the benefit of clients must be deposited in a client trust account and no funds belonging to the attorney or law firm must be deposited therein or otherwise commingled therewith, except for limited exceptions.

In November 2007, when respondent deposited the funds of \$142,416.17 in his CTA for past child support on behalf of his client, he was required to maintain the funds in his CTA. After he paid Contreras \$20,000 on May 9, 2008, respondent had a fiduciary duty to hold in trust at least \$122,416.17 (\$142,416.17 - \$20,000) of entrusted funds belonging to Contreras in his CTA. But after May 2008, the CTA balance continued to fall below \$122,416.17 and dropped to \$4.80 on February 16, 2010.

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<sup>4</sup> Revised August Statement

$$449.30 \text{ hours} - 24.75 \text{ (25 hours - .25 hour)} = 424.55 \text{ hours}$$

$$424.55 \text{ hours} \times \$200 \text{ per hour} = \$84,910 \text{ fees}$$

$$\$84,910 \text{ fees} + \$2,628.93 \text{ costs} = \$87,538.93 \text{ (June 2006 - December 2009)}$$

$$\$87,538.93 + \$4,900 \text{ (May statement)} - \$5,000 \text{ (Contreras's payment)} =$$

***\$87,438.93 Revised August Statement***

The court finds by clear and convincing evidence that respondent failed to maintain client funds in his CTA, in willful violation of rule 4-100(A), by failing to maintain \$122,416.17 on behalf of his client between May 2008 and February 2010.

***Count 2- (§ 6106 [Moral Turpitude-Misappropriation])***

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment.

Respondent offered several explanations to justify his rightful claim to his client's child support arrears. The court has considered each of his arguments and finds them to be without merit, including the contentions that he did not know he was prohibited from enforcing his attorney lien against his client's child support payments; that such law did not apply to this instant matter; and that the June 2006 fee agreement superseded the March 2006 agreement.

***Ignorance of the Law***

In *Hoover-Reynolds v. Superior Court* (1996) 50 Cal.App.4<sup>th</sup> 1273, the court held that public policy precludes an attorney's lien from being enforced against child support payments, even if they were arrearages. Respondent claimed that he was unaware of the 1996 *Hoover-Reynolds* case when he was enforcing his lien.

The "court has long recognized the problems inherent in using disciplinary proceedings to punish attorneys for negligence, mistakes in judgment, or lack of experience or legal knowledge." (*Lewis v. State Bar* (1981) 28 Cal.3d 683, 688.) "[H]owever, much of the court's expressed concern dealt with the absence of any statute or disciplinary rule permitting the imposition of discipline for 'mere ignorance of the law.'" (*Id.* at p. 689.) Here, such authorization is present under section 6106.

Unlike the attorney in *Lewis*, whose problems arose due to his complete lack of familiarity with probate law, respondent claimed to be a seasoned attorney and did not lack

experience or knowledge. In fact, in his motion for award of attorney fees in one of Contreras's matters, respondent asserted that he specialized in complex litigation and possessed the requisite learning, age, and experience in charging \$350 per hour for his services.

Therefore, contending that he did not know he was prohibited by law to attach his lien against child support arrears is indefensible.

*Hoover-Reynolds Did Not Apply*

Respondent also argued that *Hoover-Reynolds* did not apply to his situation because the facts were different. He claimed that since Contreras's children were adults at the time of enforcement and her husband was not a noncustodial parent, the \$142,416.17 child support award was reduced to an ordinary money judgment, subject to collection like any other. Thus, he maintained that he was entitled to enforce his contractual lien to secure payment for his attorney fees against the money judgment.

On the contrary, the "fact that such children may have managed to get along, though deprived of adequate support for some time, certainly does not compel the conclusion that those support monies are in any way less important to the welfare of the children involved than they were at the time awarded." (*Hoover-Reynolds v. Superior Court of San Diego County*, *supra*, 50 Cal.App.4<sup>th</sup> 1273, 1280.) "Arrearages, when finally collected, do not somehow lose their character as being necessary to support the child's welfare. On the contrary, access to these arrearages may be as critical to the child's welfare as are access to current payments, because arrearages may be the only source available for the family to replenish their depleted resources." (*Id.* at p. 1280.)

In determining the priority of competing liens on settlement proceeds, the court in *Waltrip v. Kimberlin* (2008) 164 Cal.App.4<sup>th</sup> 517, 527, had confirmed that on "grounds of public policy, an attorney lien may not attach to monies received for child support."

Absent any contrary law, respondent may not, at his convenience, recharacterize the child support award as any other money judgment and thus allowing him to attach his charging lien to the funds paid for child support obligations. He had no rights to the fund against which the lien could attach. To do so would go against the strong public policy that favors protecting the child's welfare against infringement of the right to receive support. Regardless when the funds were finally collected, the arrearages did not lose their character as being necessary to support the child's welfare and transform into ordinary money judgment. Respondent's self-help to his client's \$122,411.37 was clearly motivated by a desire to benefit himself at the expense of his client.

March 2006 Fee Agreement v. June 2006 Fee Agreement

Respondent further asserted that on June 1, 2006, Contreras signed another attorney fee contract that superseded the March 15, 2006 attorney fee agreement. But the June 1, 2006 contract, which raised the hourly fee from \$200 to \$250, while signed by respondent was not signed or dated by Contreras. Moreover, it stated that if a court orders another party to pay part or all of Contreras' attorney fees and cost under the agreement, though respondent was under no obligation to seek or enforce any such order if such order was obtained, respondent was entitled to be reimbursed at a rate of \$350 an hour. Thus, respondent claimed that the \$250 hourly fee in his August 2010 statement was correct under the June contract.

On the other hand, Contreras stated that the only fee agreement she signed was the March 15, 2006 agreement. She testified that she never agreed to the \$250 hourly fee. The March agreement provided that respondent would not change the rate without first providing Contreras at least 60 days written notice of the proposed changes and if such notice was given, respondent and Contreras agreed to negotiate in good faith with respect to such proposed changes and execute a written amendment to this agreement reflecting the agreed-on rate changes.

Respondent could not increase the rate without first notifying the client. (*Severson & Werson v. Bolinger* (1991) 235 Cal.App.3d 1569, 1573.) Thus, absent clear and convincing evidence that Contreras agreed to the June agreement or that respondent provided her with a written notice 60 days prior to any proposed changes to the March fee agreement, the June agreement does not supersede the March agreement and the March contract stands as the governing document. The agreed hourly fee was \$200.

### Misappropriation

Once respondent deposited the DCSS checks into his CTA, he had a fiduciary duty to protect the child support arrears on behalf of Contreras. Arguably, assuming that Contreras had agreed to the June 1, 2006 agreement and respondent could have enforced his attorney lien against the child support payments, he withdrew the funds as his attorney fees without the knowledge or consent of Contreras and the CTA balance still fell below the amount of entrusted funds held in his trust.

It is well settled that the mere fact that the balance in an attorney's trust account has fallen below the total of amounts deposited in and purportedly held in trust, supports a conclusion of misappropriation. (*Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 474-475.) The rule regarding safekeeping of entrusted funds leaves no room for inquiry into the attorney's intent. (See *In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113.)

“[O]nce the trust account balance is shown to have dipped below the appropriate amount, an inference of misappropriation may be drawn.” (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618.)

Had the August billing statement been adjusted to include credit for Contreras's \$5,000 payment and correct the 25-hour telephone conversation (\$6,250) to .25 hour (\$62.50) on June 20, 2006, the outstanding amount should therefore be lowered from \$119,178.93 to \$107,991.43.

Thus, by his own accounting, after deducting the outstanding amount from the entrusted funds, respondent still owes Contreras at least \$14,424.74 (\$122,416.17 - \$107,991.43). But when the CTA balance depleted to \$4.80 in February 2010, the amount of \$14,419.94 (\$14,424.74 - \$4.80) is unaccounted for.<sup>5</sup>

Therefore, when the balance in respondent's CTA fell below \$122,416.17 and dropped to \$4.80, an inference is drawn that respondent had misappropriated \$122,411.37 (\$122,416.17 - \$4.80) of his client funds.

Respondent had used the CTA funds for his own use and benefit, whether he had yet earned the funds. In fact, the CTA balance frequently fell below the necessary amount of entrusted funds. For example, based on his August statement, the allegedly earned fees were \$106,516.43 on July 9, 2009. Thus, the CTA balance should have been \$15,899.74 (\$122,416.17 - \$106,516.43). Instead, the CTA balance on July 10, 2009, had dropped to \$164.87.

“The misappropriation in this case ... was not the result of carelessness or mistake; [respondent] acted deliberately and with full knowledge that the funds belonged to his client. Moreover, the evidence supports an inference that [respondent] intended to permanently deprive his client of her funds.” (*Grim v. State Bar* (1991) 53 Cal.3d 21, 30.)

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<sup>5</sup>Adjusted Statement

August 2010 Statement	\$119,178.93
Contreras's payment	\$ - 5,000.00
Telephone conference (\$6,250 - \$62.50)	<u>\$ - 6,187.50</u>

<i>Adjusted Statement</i>	<i>\$107,991.43</i>
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*Amount Owing to Contreras*

Amount entrusted in CTA	\$122,416.17
Adjusted Statement	<u>- 107,991.43</u>
<i>Amount still owing to Contreras (by respondent's own accounting)</i>	<b>\$ 14,424.74</b>

Time and time again, respondent was withdrawing funds that belonged to his client before he had even earned the fees and without informing his client that he was enforcing the lien. To justify his improper withdrawals, respondent produced the August 2010 invoice only after Contreras had complained to the State Bar. And even that did not provide a full and accurate accounting of the child support arrears. Therefore, the court rejects respondent's arguments that he was rightfully withdrawing funds from the CTA to pay his fees. He was, in fact, withdrawing more than what he claimed to have earned.

“There is no doubt that the wilful misappropriation of a client’s funds involves moral turpitude.” (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1033-1034.) Thus, respondent committed an act of moral turpitude in willful violation of section 6106 by misappropriating at least \$122,411.37 of Contreras’s funds as of February 16, 2010.

***Count 3 - (§ 6106 [Moral Turpitude – Misrepresentation to Client])***

By telling Contreras that he could not release the child support arrears that he had received from DCSS on her behalf until her ex-husband signed some form of release, by telling Contreras that he had received permission from the court to pay 10 months of her ex-husband's unpaid rent from the child support arrears, and by telling Contreras on or about June 8, 2009, that he could not release the child support arrears without a court order, when he knew those statements to be false, respondent committed acts involving moral turpitude, dishonesty or corruption in willful violation of section 6106.

***Count 4 - (§ 6106 [Moral Turpitude - Misrepresentation to a Court])***

The State Bar asserted that respondent by declaring under penalty of perjury in support of a motion for attorney's fees which was filed with the Sacramento County Superior Court that he had been hired by Contreras "at a rate of \$350 per hour . . . and for which she is now obligated," respondent committed an act involving moral turpitude, dishonesty or corruption.



Contreras testified that she was not fully aware that he asked the court for \$350 an hour for obtaining other orders. At the same time, Contreras testified that she had numerous meetings with respondent prior to filing the May 29, 2009 trial brief with the Sacramento County Superior Court. She testified that she went through the May 29, 2009 trial brief prior to and after trial. She did not testify that she did not see the trial brief, but rather she said that she did not remember. Also, she testified that she was not all that concerned with his attorney fees for the related cross-claims because her understanding was that the attorney fees were respondent's business.

Thus, because there was no clear and convincing evidence that Contreras was unaware of the \$350 hourly fee respondent was charging her ex-husband in attorney fees, respondent did not misrepresent to the court in willful violation of section 6106.

***Count 5 - (Rule 4-100(B)(3) [Maintain Records of Client Property/Render Appropriate Accounts])***

Rule 4-100(B)(3) provides that an attorney must maintain records of all client funds, securities, and other properties coming into the attorney's possession and render appropriate accounts to the client regarding such property.

Respondent admitted that as to the cases not involving his attorney fees against Contreras's ex-husband, he did not give statements to Contreras between June 2006 and August 2010, although respondent was obligated to provide monthly statements under their fee agreement. In November 2007, respondent was entrusted with \$142,416.17. Between 2006 and 2009, respondent provided substantial legal services on behalf of Contreras. It was only when she complained to the State Bar in May 2010 that respondent provided the second statement a few months later, on August 17, 2010, with a balance due of \$119,178.93.

Thus, respondent failed to render appropriate accounts to a client regarding all funds coming into respondent's possession (November 2007) for almost three years (August 2010), in willful violation of rule 4-100(B)(3).

***Count 6 - (Rule 4-100(B)(3) [Maintain Records of Client Property/Render Appropriate Accounts])***

The State Bar asserted that by providing a statement to Contreras on August 17, 2010, which misstated the agreed upon hourly fee (\$250 instead of \$200), did not account for a \$5,000 payment by Contreras, and charged for a 25-hour telephone call (instead of .25 hour), respondent failed to render an appropriate account to a client regarding all funds coming into respondent's possession.

Respondent made an honest mistake regarding the billing in terms of the \$5,000 payment and the charge for the 25-hour phone call. He readily admitted that it should have been .25 hour instead of 25 hours and that he forgot to credit her for the \$5,000 payment. The gravamen of his misconduct was his failure to provide an accounting of the entrusted funds as found in count five, not the mistakes in accounting.

Thus, the court dismisses count six with prejudice.

***Count 7 - (Rule 3-700(D)(1) [Failure to Return Client Papers/Property])***

Rule 3-700(D)(1) requires an attorney, upon termination of employment, to promptly release to the client, at the client's request, all client papers and property, subject to any protective order or non-disclosure agreement. This includes pleadings, correspondence, exhibits, deposition transcripts, physical evidence, expert's reports and other items reasonably necessary to the client's representation, whether the client has paid for them or not.

On August 17, 2010, Contreras terminated respondent's employment and requested her files. Despite Contreras's repeated requests and respondent's promise to do so, respondent did

not release her files until September 7, 2011, more than a year later. By failing to release promptly to the client, upon termination of employment, at the request of the client, all the client papers and property, respondent willfully violated rule 3-700(D)(1).

***Count 8 - (§ 6068, subd. (m) [Failure to Communicate])***

Section 6068, subdivision (m), provides that an attorney has a duty to promptly respond to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

After the December 23, 2009 letter from respondent, Contreras testified that she tried to contact respondent on numerous occasions and all she heard was a voicemail. Respondent testified that he met with Contreras in February 2010 to discuss what further work she wanted him to do on her case. Whether this February meeting took place or whether Contreras met him just prior to January 1, 2010, is irrelevant as to the issue of respondent's failure to communicate with his client.

There is clear and convincing evidence that sometime in May 2010, after only being able to leave voicemail messages to respondent, Contreras went to respondent's office in Fair Oaks and discovered that respondent no longer had an office at that location. Because she could not locate or speak with respondent, Contreras filed a complaint with the State Bar. The next time Contreras heard from respondent was June 26, 2010, when he wrote her a letter informing her that he had moved his office.

By not responding to Contreras's phone messages beginning at least in March of 2010 until June 26, 2010, and not informing her that he had moved, respondent failed to respond promptly to reasonable status inquiries of a client in willful violation of section 6068, subdivision (m).

***Count 9 - (§ 6068, subd. (i) [Failure to Cooperate])***

Section 6068, subdivision (i), provides that an attorney has a duty to cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against the attorney.

On August 3, August 18, and September 2, 2010, the State Bar wrote to respondent regarding the Contreras matter. Respondent did not receive the original August 3 letter because it was returned to the State Bar as undeliverable. Although he did not provide a written response to the August 18 letter, he informed the State Bar by telephone that he had moved. And when the State Bar told him to respond by September 17 in its September 2 letter, respondent wrote a seven-page reply letter to the State Bar, responding to Contreras's complaint, on September 16, 2010.

“Section 6068(i) requires attorneys to respond in some fashion to State Bar investigators' letters.” (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 644.) Once respondent replied with a seven-page response letter to the Contreras matter and indicated a willingness to cooperate, he did not fail to cooperate at the investigation stage. In fact, the State Bar did not write to respondent again until almost a year later in 2011, a month before the NDC was filed, seeking additional documents. The statute does not require that the attorney must respond to each and every question or request from the State Bar. It is sufficient that respondent had responded “in some fashion” to the State Bar.

By providing a detailed response in his September 16, 2010 letter, albeit not to the full satisfaction of the State Bar, respondent was not culpable of failing to cooperate in the State Bar's investigation, in willful violation of section 6068, subdivision (i).

***Count 10 - (§ 6068, subd. (j) [Failure to Update Membership Records Address])***

Section 6068, subdivision (j), provides that it is an attorney's duty to comply with the requirements of section 6002.1. Section 6002.1 requires, in pertinent part, that members maintain, on the official membership records of the State Bar, their current office address and telephone number; and in the event that a member's address or office telephone information changes, the member must notify the membership records office of the State Bar within 30 days. If the member does not maintain an office, then the member is required to maintain on the State Bar's membership records an address to be used for State Bar purposes.

Sometime before June 26, 2010, respondent moved his office from Fair Oaks to Carmichael. Yet he did not officially change his address with the State Bar until September 15, 2010. By not notifying the State Bar of his new office address within 30 days after he moved, respondent failed to maintain on the official membership records of the State Bar a current office address in willful violation of section 6068, subdivision (j).

**Aggravation<sup>6</sup>**

**Prior Record of Discipline (Std. 1.2(b)(i).)**

Respondent has a prior record of discipline. By order filed November 30, 1998, respondent was suspended for one year, execution stayed, and he was placed on probation for two years on conditions, including 45 days' actual suspension. The misconduct involved two client matters in 1994 and 1995 and included failing to maintain funds in the client trust account, failing to avoid the representation of adverse interests, failing to promptly pay client funds, and failing to cooperate with the State Bar. There, compelling mitigating circumstances were

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<sup>6</sup> All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

remorse, emotional and physical difficulties, rehabilitation, and good character references.

(Supreme Court case No. S073471; State Bar Court case No. 95-O-10916.)

**Multiple Acts/Pattern of Misconduct (Std. 1.2(b)(ii).)**

Respondent's multiple acts of misconduct are an aggravating factor. He failed to maintain client funds in a trust account; failed to render accounts of client funds for three years; misappropriated client's child support payments of \$122,411.37; unilaterally withdrew his fees from the entrusted funds; failed to promptly release client file; failed to respond to client inquiries; and failed to timely update his membership address.

**Misconduct Surrounded/Followed by Bad Faith, Dishonesty, Concealment, Overreaching or Other Violations of State Bar Act/ Rules of Professional Conduct; If Trust Funds/Property Involved, Refusal/Inability to Account to Client/Other Person for Improper Conduct Toward Funds/Property (Std. 1.2(b)(iii).)**

When Contreras repeatedly asked that respondent release the child support arrears after June 2009, respondent may not withhold the undisputed portion of the client funds. The undisputed amount must be paid promptly to the client upon demand. (*Friedman v. State Bar* (1990) 50 Cal.3d 235, 240-241.) Instead, he misrepresented to his client that he could not release the DCSS checks until her ex-husband and his counsel signed some form of release.

Rule 4-100(B)(4) requires an attorney to promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the attorney's possession which the client is entitled to receive. By failing to promptly pay those funds which the client was entitled to receive, as requested by the client after June 2009, respondent committed an uncharged violation of rule 4-100(B)(4).

**Harm to Client/Public/Administration of Justice (Std. 1.2(b)(iv).)**

Respondent's failure to pay the child support arrears deprived his client of the entrusted funds for several years.

### **Indifference Toward Rectification/Atonement (Std. 1.2(b)(v).)**

Respondent demonstrated lack of insight into his wrongdoing. On one hand, he argued that he was not aware of the case law that prohibited an attorney lien from being enforced against child support payments. On the other hand, he contended that the law did not apply to his misappropriation because the client's children were adults. Thus, he continued to assert, despite overwhelming evidence to the contrary, that he was entitled to enforce his attorney lien against the client's child support payments that were in his possession. Yet, he still failed to recognize that his withdrawals from the CTA went far beyond enforcing his attorney lien. His CTA balance fell below the amount of his allegedly earned attorney fees. Even giving respondent the benefit of the doubt, the amount of \$14,419.94 (see count two discussion) is still unaccounted for as of February 2010. "The law does not require false penitence. [Citation.] But it does require that the respondent accept responsibility for his acts and come to grips with his culpability. [Citation.]" (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.)

### **Mitigation**

#### **Good Faith (Std. 1.2(e)(ii).)**

Respondent asserted as mitigation that he acted in good faith belief that he could charge his attorney lien against the child support payments. "In order to establish good faith as a mitigating circumstance, an attorney must prove that his or her beliefs were both honestly held and reasonable." (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 788.) "To conclude otherwise would reward an attorney for his unreasonable beliefs and 'for his ignorance of his ethical responsibilities.' [Citation.]" (*Ibid.*)

The court could not conclude that when he received the DCSS checks in November 2007, respondent acted reasonably in light of his 28 years of practice at the time. He knew or should have known that he was forbidden to unilaterally withdraw his fees from those funds,

particularly without any notice to the client. Under their fee agreement, he was to provide monthly statements. In fact, in his prior record of discipline, he was found culpable of similar misconduct in 1994 – allowing the balance in his CTA to fall below the amount of the entrusted funds.

Therefore, respondent's assertion of a good faith belief in its correctness that he was entitled to enforce the attorney lien is given minimal weight in mitigation.

**Extreme Emotional/Physical Difficulties (Std. 1.2(e)(iv).)**

Respondent suffered emotional and physical difficulties. In 2007, his wife had a stroke and in 2009, she was hospitalized. Around that time, he had the shingles and the pain medication made it difficult for him to work. However, he did not demonstrate by clear and convincing evidence that his health played a significant part in his misconduct. Thus, his health and family life issues are entitled to minimal weight in mitigation.

**Discussion**

Standard 1.3 provides that the primary purposes of discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

In determining the appropriate level of discipline, this court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Second, the court looks to decisional law. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of



imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed must be the most severe of the applicable sanctions. (Std. 1.6(a).)

Standards 2.2(a), 2.2(b), 2.3, 2.4, 2.6, and 2.10 apply in this matter. The most severe sanction is found at standard 2.2(a) which recommends disbarment for willful misappropriation of entrusted funds unless the amount misappropriated is insignificantly small or unless the most compelling mitigating circumstances clearly predominate, in which case the minimum discipline recommended is one-year actual suspension.

The Supreme Court gives the standards “great weight” and will reject a recommendation consistent with the standards only where the court entertains “grave doubts” as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

The State Bar urged that respondent be disbarred from the legal profession and ordered to make restitution payment of the entrusted funds (\$122,416.17).

Respondent, on the other hand, maintained that he was entitled to the child support arrearages and that he represented Contreras diligently and competently.

Respondent’s due diligence or competence was never questioned. Rather, his alleged entitlement to the child support arrearages was the issue. As a matter of public policy, California law is clear that where child support arrears are involved, an attorney is prohibited from attaching his attorney lien to monies received for child support. “Any effort to assert such a lien is void, whether it be against funds in the hands of the clerk, the lawful custodian of the children, or an attorney.” (*Hoover-Reynolds v. Superior Court*, *supra*, 50 Cal.App.4<sup>th</sup> 1273,1278.)

“In a society where the use of a lawyer is often essential to vindicate rights and redress injury, clients are compelled to entrust their claims, money, and property to the custody and control of lawyers. In exchange for their privileged positions, lawyers are rightly expected to exercise extraordinary care and fidelity in dealing with money and property belonging to their clients. [Citation.] Thus, taking a client’s money is not only a violation of the moral and legal standards applicable to all individuals in society, it is one of the most serious breaches of professional trust that a lawyer can commit.” (*Howard v. State Bar, supra*, 51 Cal.3d 215, 221.)

The court finds these cases instructive.

In *In re Abbott* (1977) 19 Cal.3d 249, the attorney intentionally misappropriated approximately \$30,000 from a single client, and as a result, he was convicted of grand theft. In mitigation, he had practiced law blemish-free for 13 years before his misconduct, presented evidence that he suffered from manic-depressive psychosis, submitted character evidence from several attorneys and judges, and had displayed remorse. The Supreme Court did not find these factors sufficiently compelling to warrant less than disbarment.

In *Grim v. State Bar* (1991) 53 Cal.3d 21, the attorney misappropriated over \$5,500 of client funds and did not return the funds to the client until after almost three years later and after the State Bar had initiated disciplinary proceedings and held an evidentiary hearing. The Supreme Court did not find compelling mitigating circumstances to predominate and rejected his defense of financial stress as mitigation because his financial difficulties which arose out of a business venture were neither unforeseeable nor beyond his control. Finally, the attorney intended to permanently deprive his client of her funds. The Supreme Court therefore did not find his cooperation with the State Bar and evidence of good character to constitute compelling mitigation in view of the aggravating factors. He was disbarred.

Here, respondent failed to disburse any portion of his client's child support arrears, except for the \$20,000, and instead, misappropriated \$122,416.17 of his client funds. His misconduct was not a single act of negligent misappropriation. When he finally provided her with a statement of his legal services, after she had filed a complaint with the State Bar, he claimed that he was entitled to withdraw from those entrusted funds to pay his fees for the four-year period.

The courts in California have consistently recognized that a child support award is not an ordinary debt but is instead a court-ordered obligation designed to protect the welfare of the child. (*In re Marriage of Ayo* (1987) 190 Cal.App.3d 442, 451.) Moreover, it is settled that an attorney-client relationship is of the highest fiduciary character and always requires utmost fidelity and fair dealing on the part of the attorney. (*Beery v. State Bar* (1987) 43 Cal.3d 802, 813.) Respondent had flagrantly breached his fiduciary duties by violating 4-100(A), 4-100(B)(3), 4-100(B)(4), and section 6106.

More significantly, respondent's misappropriation weighs heavily in assessing the appropriate level of discipline. Even assuming that Contreras owed respondent \$87,438.93 in attorney fees and costs, based on the adjusted statement at \$200 per hour, respondent still took more money from the CTA than he had earned. He failed to reimburse the client \$34,977.24 (\$122,416.17 - \$87,438.93), a significant amount. (See *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1367-1368 [misappropriation of \$1,355.75 considered significant].) "It is precisely when the attorney's need or desire for funds is greatest that the need for public protection afforded by the rule prohibiting misappropriation is greatest." (*Id.* at p. 31.)

The Supreme Court has repeatedly held that disbarment is the usual discipline for the willful misappropriation of client funds. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 37; and *Howard v. State Bar* (1990) 51 Cal.3d 215, 221.)

In recommending discipline, the “paramount concern is protection of the public, the courts and the integrity of the legal profession.” (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.) The misappropriation of client funds is a grievous breach of an attorney’s ethical responsibilities, violates basic notions of honesty and endangers public confidence in the legal profession. Therefore, in all but the most exceptional cases, it requires the imposition of the harshest discipline – disbarment. (*Grim v. State Bar, supra*, 53 Cal.3d 21.)

Under standard 2.2(a), lesser discipline than disbarment is not warranted because the amount misappropriated is not insignificantly small and the most compelling mitigating circumstances do not clearly predominate. The State Bar argued that the restitution payment should be \$122,416.17. The court considers that amount to be unjust enrichment in view of respondent's substantial legal services performed on behalf of Contreras and thus declines to order such an amount. Rather, the restitution amount should be \$34,977.24.

Therefore, after considering the evidence, the standards and other relevant law, the court concludes that respondent's disbarment is appropriate to protect the public and preserve public confidence in the legal profession. Accordingly, the court so recommends.

### **Recommendations**

It is recommended that respondent **John Chauncey Hayes**, State Bar Number 88708, be disbarred from the practice of law in California and respondent’s name be stricken from the roll of attorneys.

### **Restitution**

It is also recommended that respondent make restitution to the following client within 30 days following the effective date of the Supreme Court order in this matter or within 30 days following the Client Security Fund payment, whichever is later (Rules Proc. of State Bar, rule 5.136):

1. To Gloria Contreras in the amount of \$34,977.24 plus 10 percent interest per year from August 18, 2010. Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

### **California Rules of Court, Rule 9.20**

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding.

### **Costs**

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

### **Order of Involuntary Inactive Enrollment**

Respondent is ordered transferred to involuntary inactive status pursuant to Business and Professions Code section 6007, subdivision (c)(4). Respondent's inactive enrollment will be effective three calendar days after this order is served by mail and will terminate upon the effective date of the Supreme Court's order imposing discipline herein, or as provided for by rule 5.111(D)(2) of the State Bar Rules of Procedure, or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: March \_\_\_\_, 2012

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PAT McELROY  
Judge of the State Bar Court